STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 28, 2011
v	No. 300772 Tuscola Circuit Court
MARKEITHIS THOMAS-JAMES SMITH, Defendant-Appellant.	LC No. 09-011108-FH

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

In this delayed appeal by leave granted, defendant Markeithis Thomas-James Smith appeals his plea-based conviction of conspiracy to furnish a cellular telephone or other wireless communication device to a prisoner at a correctional facility. See MCL 750.157a; MCL 800.283a. The trial court sentenced Smith as a habitual offender, see MCL 769.10, to serve six months to seven and one-half years in prison for his conviction. On appeal, Smith argues that his statements at his plea proceeding were insufficient to serve as the factual basis for his guilty plea because the persons housed at the facility at issue were not prisoners and the facility itself was not a correctional facility. In addition, he argues that the trial court erred in sentencing him. We conclude that the facility at issue was a correctional facility and that its inmates were prisoners as those terms are defined under MCL 800.281a(e) and (g). Accordingly, Smith's statements were sufficient to establish the factual basis for his plea-based conviction. We also conclude that there were no sentencing errors that warrant relief. For these reasons, we affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

Prior to the events at issue, Smith was apparently on parole after having been convicted of larceny from a person. At the plea hearing in this case, Smith stated that he violated his parole and was incarcerated at the Wayne County Jail. He was then transferred to a facility that the Department of Corrections (the Department) operates in Tuscola County (the Tuscola Facility).

The inmates at the Tuscola Facility are all part of the Department's Residential Re-Entry Program (the Program). According to the Department's policy statement for the Program, see Mich Dep't of Corrections Policy Directive 06.03.104,[1] the Program is intended to provide parolees with special services to help them "transition into the community." The Program is administered at the Tuscola Facility and a facility in Lake County. *Id.* at ¶ B.

The Department requires that the facilities that house the Program "be operated consistent with the requirements set forth for [a] corrections center in Department policy directives for corrections centers . . . ." *Id.* at ¶ I. Indeed, the Tuscola Facility is a secure facility; it is guarded by the Department's officers 24 hours per day, every day. See *id.* at ¶ C (noting that the Tuscola and Lake facilities provide 24 hour per day supervision of offenders) and ¶ I (stating that the facilities must be operated as community correction centers). The inmates housed at the Tuscola Facility are also not free to leave the facility on their own initiative and must abide by the Department's rules for prisoner discipline. See *id.* at ¶¶ C and R.[2]

An offender may be placed into the Program in one of two ways: the offender can be paroled, but required to complete the Program as a condition of parole, or may be entered into the Program after a parole violation while on parole in a community. *Id.* at ¶¶ J to O. A parolee who fails to complete the Program may be reclassified and returned to what the Department calls a Correctional Facilities Administration (CFA) institution. *Id.* at ¶ B. According to the Department's policy directive, the maximum term for participation in the Program is 120 days. *Id.* at ¶ C. An offender who was released into the community on parole, but required to enter the Program for a parole violation, will be "returned to active parole in the community" upon successful completion of the Program. *Id.* at ¶¶ U and V. A prisoner who was sent to the Program from a CFA institution will likewise be "returned to community supervision." *Id.* at ¶ W.

After Smith entered the Program at the Tuscola Facility, officers at the Facility discovered him with a cell phone. At his plea hearing, Smith stated that another inmate "got it in", but that he agreed to share the phone with that inmate and to furnish it to other inmates. In the information filed in February 2009, the prosecutor alleged that Smith conspired to furnish a cell phone to prisoners in violation of MCL 750.157a and MCL 800.283a. In September 2009, Smith pleaded guilty to that charge.

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[1] Smith attached this policy directive to his brief in support of his motion to withdraw his plea.

[2] The prosecutor described the Tuscola Facility in her brief in opposition to Smith's motion as a secure facility: "While those inmates at the facility are classified as parolees, they are kept in a facility which is secured by razor wire, supervised by guards, and prohibited from leaving the facility before completion of the program."

At his sentencing, Smith first raised his contention that he could not properly be found guilty of furnishing a cell phone to a prisoner because none of the inmates at the Tuscola Facility were prisoners within the meaning of MCL 800.281a(g). He also argued that the Tuscola Facility was itself not a correctional facility within the meaning of MCL 800.281a(e). The trial court refused to consider the motion at sentencing, but informed Smith that it would consider the merits of the issue after a formal motion. The trial court later sentenced Smith under the terms of his plea deal to serve six months to seven and one-half years in prison for his conviction.

In April 2010, Smith moved to have his plea withdrawn for the reasons proffered at his sentencing. The trial court held a hearing on the matter in May 2010 and denied the motion in July 2010.

This appeal followed.

II. ESTABLISHING THE FACTUAL BASIS FOR THE GUILTY PLEA

A. STANDARD OF REVIEW

Smith first argues that his plea was insufficient to establish the factual basis for his plea to the charge of conspiring to furnish a wireless device to a prisoner at a correctional facility. Specifically, he argues that, the inmates housed at the Tuscola Facility were not prisoners and the Tuscola Facility was not a correctional facility. Accordingly, he maintains, his statements that he agreed with another inmate to furnish a cell phone to other inmates at the Tuscola Facility did not establish a conspiracy to violate MCL 800.283a. For that reason, he concludes, he is entitled to withdraw his plea.

This Court reviews a trial court's decision on a motion to withdraw a guilty plea for an abuse of discretion. *People v Adkins*, 272 Mich App 37, 38; 724 NW2d 710 (2006). However, whether particular conduct falls within the scope of a criminal statute is a question of law that this Court reviews de novo. *Id.* at 39. Likewise, this Court reviews de novo the proper interpretation of statutes. *People v Bemer*, 286 Mich App 26, 31; 777 NW2d 464 (2009).

B. ANALYSIS

Before accepting Smith's guilty plea, the trial court had to establish the factual basis for the plea. See MCR 6.302(D)(1); *People v Carlisle*, 387 Mich 269, 273; 195 NW2d 851 (1972). Generally, a factual basis for a guilty plea exists when a trier of fact could properly convict the defendant on the basis of the defendant's admissions at the plea proceeding. *People v Hogan*, 225 Mich App 431, 433; 571 NW2d 737 (1997). Here, Smith does not contest that his admissions established the elements of conspiracy. Rather, he claims that his admissions did not establish the elements of furnishing a wireless device to a prisoner in a correctional facility.

The Legislature has made it a felony to furnish certain types of contraband to prisoners at a correctional facility. See MCL 800.281 *et seq*. This includes a prohibition against the furnishing of wireless communication devices. MCL 800.283a. In this case, there is no dispute that Smith possessed a wireless communication device—a cell phone—within the Tuscola Facility. The dispute centers on whether the inmates to whom he conspired to furnish the device were prisoners and whether the Tuscola Facility was a correctional facility.

1. THE INMATES AT THE TUSCOLA FACILITY ARE PRISONERS

For purposes of the statutes dealing with contraband in correctional facilities, the Legislature defined the term "Prisoner" to mean "a person committed to the jurisdiction of the department who has not been released on parole or discharged." MCL 800.281a(g). It is undisputed that the "persons" housed at the Tuscola Facility have all been committed to the Department's jurisdiction and, as parolees, are subject to the Department's rules. See MCL 791.238(1) (stating that prisoners on parole remain in the Department's legal custody); MCL 791.206(1)(c) (granting the Department the authority to promulgate rules concerning parole and over the supervision of parolees); MCL 791.231 (establishing a bureau of field services within the Department that is responsible for parole). Similarly, it is uncontested that the persons at issue were not "discharged" from the Department's jurisdiction. Thus the only dispute concerns whether the persons housed at the Tuscola Facility were "released on parole" as that phrase is used in MCL 800.281a(g).

Michigan Courts have long recognized that a grant of parole generally constitutes permission to leave confinement with certain restrictions. See *In re Dawsett*, 311 Mich 588, 595; 19 NW2d 110 (1945) (stating that parole is simply a permit to go without the enclosure of the prison); see also *People v Raihala*, 199 Mich App 577, 579; 502 NW2d 755 (1993) (characterizing the grant of parole is a form of conditional release from prison). However, it is noteworthy that, in drafting MCL 800.281a(g), the Legislature did not exclude "parolees", persons "on parole", or persons who have been "paroled" from the class of persons under the Department's jurisdiction, who are not prisoners; instead, it excluded only those persons who have been committed to the Department's jurisdiction that have been "released on parole." This Court must, if at all possible, construe the phrase "released on parole" by giving each word in the phrase meaning. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). Because the Legislature specifically excluded persons "released on parole"—as opposed to "parolees", persons "on parole", or persons who have been "paroled", we conclude that the Legislature intended to limit the exclusion to a specific class of parolees rather than parolees in general. That is, we construe the term "prisoner", as defined by MCL 800.281a(g), to include parolees who have not yet been released. For that reason, we reject Smith's contention that any person who is on parole is necessarily not a prisoner for purposes of MCL 800.281a(g).

This understanding of the phrase "released on parole" is consistent with the Legislature's decision to place separate requirements on the grant of parole and the release of a parolee. The Legislature specifically limited the parole board's ability to "grant parole" through a series of requirements found under MCL 791.233(1). In addition, the Legislature provided that a "prisoner shall not be released on parole until the parole board has satisfactory evidence that arrangements have been made for such honorable and useful employment as the prisoner is capable of performing . . . ." MCL 791.233(1)(e). And this Court has recognized the distinction between being granted parole and being released on parole.

In *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 154; 532 NW2d 899 (1995), this Court addressed whether the parole board had the authority to grant a prisoner parole without first obtaining evidence of "confirmed employment." This Court concluded that there was a distinction between the grant of parole and being released on parole:

> It is clear from this subsection [MCL 791.233(1)(e)] that the *granting* of parole is conditioned upon the inmate not being *released* until satisfactory evidence of useful employment is provided to the board. It would be unreasonable to require a prisoner to obtain employment before parole is granted. On the other hand, it is not unreasonable to withhold releasing a parolee until employment is obtained. [*Id.*]

Likewise, the Legislature has also provided for "Paroles-in-custody" under certain circumstances, such as when out-of-state agencies or immigration officials request that a prisoner be "paroled in custody." See MCL 791.233(2). Further, the parole board has the authority to rescind a parole order before the prisoner is released on parole. See MCL 791.236(2).

As can be seen, the Legislature has—through various statutory provisions—established a clear distinction between being *granted* parole and being *released* from incarceration after parole. That is, Michigan law plainly recognizes that a person who has been granted parole might nevertheless remain incarcerated even after being paroled. And there are compelling policy reasons for treating parolees-in-custody different from parolees who have been released into the community.

The purpose behind the statutes at issue is to keep contraband out of state correctional facilities and to ensure order and discipline within those facilities. See *People v Krajenka*, 188 Mich App 661, 664; 470 NW2d 403 (1991). These purposes would be severely undermined if this Court were to construe the phrase "released on parole" as the functional equivalent of having been "paroled", and, on that basis, were to conclude that parolees-in-custody were not prisoners within the meaning of MCL 800.281a(g). The Legislature, as a matter of public policy, determined that parolees who had not yet been released on parole should be treated as "prisoners" for purposes of the statutory ban on contraband in correctional facilities and this Court will respect that policy choice.

On appeal, Smith attempts to give meaning to the phrase "released on parole" by asserting that it does not refer to release into the community, but rather to "release from prison." Because the persons within the Program and housed at the Facility were all released from prison to the Tuscola Facility after their parole, he maintains, they were all "released on parole." That is, he argues that a transfer from one of the Department's facilities to another of the Department's facilities is the functional equivalent of being "released on parole", where the facility to which the parolee is transferred is not a prison. We find this attempt to give the word "released" meaning unpersuasive.

Setting aside that this argument assumes that the Tuscola Facility is not a prison, we cannot agree that this construction is consistent with the plain meaning of the phrase or that it is consistent with the Legislature's recognition that a parolee might remain incarcerated for a period of time before release. This Court must construe the phrase "released on parole" according to its plain and ordinary meaning. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). An ordinary person would understand that "released on parole" means released from confinement—that is, released into the community—and would not consider a transfer from one of the Department's secured facilities to another of the Department's secured facilities, without regard to whether the facilities can be fairly described as prisons, to constitute

being "released on parole." See, e.g., *Random House Webster's College Dictionary* (1997) (defining release to mean, in relevant part, "to free from confinement, [or] bondage"). Indeed, the statutes governing parole also assume that being "released on parole" means being released into the community. See MCL 791.237(1) (requiring the Department to provide a prisoner who is released on parole with clothing and a nontransferable ticket to the place where the prisoner is to reside and providing discretion to give the prisoner an advance of money for "reasonable maintenance and subsistence for a 2-week period"). This understanding is true even if the new facility has less severe restrictions and is intended as an intermediate step before release into the community. This understanding is also consistent with the Legislature's recognition that a parolee might remain in custody for some time before being released into the community.

Although the inmates at the Tuscola Facility are on parole, they have not been released from confinement and sent into the community. Therefore, they have not been "released on parole." Consequently, they are prisoners within the meaning of MCL 800.281a(g).

2. THE TUSCOLA FACILITY IS A CORRECTIONAL FACILITY

In order to be guilty of violating MCL 800.283a, one must furnish a wireless device to a "prisoner in a correctional facility." A correctional facility is defined to mean:

> (*i*) A state prison, reformatory, work camp, or community corrections center.
>
> (*ii*) A youth correctional facility operated by the department or a private vendor . . . .
>
> (*iii*) A privately operated community corrections center or resident home which houses prisoners committed to the jurisdiction of the department.
>
> (*iv*) The land on which a facility described in subparagraph (*i*), (*ii*), or (*iii*) is located. [MCL 800.281a(e)(*i*)-(*iv*).]

The Tuscola Facility is not a privately operated facility and is plainly not a youth correctional facility. As such, the relevant definition is that provided by MCL 800.281a(e)(*i*).

The Legislature did not define the term "state prison" within the statute at issue. In addition, although the Legislature has elsewhere defined correctional facility in broad terms that plainly encompass prisons, see, e.g., MCL 791.234(18)(b) (defining a state correctional facility as a facility "that houses prisoners committed to the jurisdiction of the department . . . ."), it has not specifically defined the term "prison" elsewhere. Similarly, Michigan courts have examined what constitutes a prison under other statutes, but the statutes did not involve a definition for the actual term "prison." See, e.g., *People v Mayes*, 95 Mich App 188, 189; 290 NW2d 119 (1980) (construing MCL 768.7a and concluding that a halfway house is a prison for purposes of the prison escape statute because it is grounds under the control of persons authorized by the Department to have inmates under its care, custody, and supervision and, consequently, is a "penal or reformatory institution" in this state). Likewise, to the extent that the term prison could be said to have acquired a technical meaning, it is commonly understood to refer to a facility operated by or on behalf of the Department, as opposed to those facilities operated by a local or county government, which are commonly called jails. See *People v Merkerson*, 147 Mich App

207, 209-210; 382 NW2d 750 (1985) (stating that the Detroit House of Corrections is both a jail and a prison because it houses inmates committed to the county's jurisdiction as well as those committed to the Department's jurisdiction). Nevertheless, because the term "state prison" is not defined by statute, clearly refers to facilities operated by the state through the Department, and has not otherwise acquired a technical meaning under the law, this Court must give the term its plain and ordinary meaning. See *Estate of Wolfe-Haddad v Oakland Co*, 272 Mich 323, 325; 725 NW2d 80 (2006), citing MCL 8.3a.

A prison is commonly understood to be "a building for the confinement of accused persons awaiting trial or persons sentenced after conviction" or "any place of confinement or involuntary restraint." See *Random House Webster's College Dictionary* (1997). And a state prison would commonly be understood to be a prison operated by the state of Michigan—that is, by the Department. It follows then that a "state prison" is any facility operated by the Department to involuntarily restrain persons committed to its jurisdiction. Here, the Tuscola Facility is clearly operated by the Department—albeit through the bureau in charge of parole—and is used to involuntarily confine persons committed to its jurisdiction. The fact that the persons confined there are parolees and will, assuming they meet the requirements for release into the community, soon be released does not alter the fact that it is a secure facility from which the inmates cannot leave without permission.[3] It is, therefore, a state prison.

We also reject Smith's contention that the Facility cannot be a prison because it houses parolees rather than prisoners. This argument assumes that parolees are necessarily persons who have been released from prison. Although MCL 791.238(6) provides that a "parole shall be construed as a permit to the prisoner to leave the prison, and not as a release," this provision does not require the release of parolees into the community and, as already demonstrated, parolees might remain incarcerated even after having been paroled. No one would seriously argue that the prison at Jackson ceases to be a prison to the extent that it houses inmates who have been paroled, but not yet released. And if the Department elected to house the Program at the Jackson facility, it would not change the essential character of that facility. The fact that the parolees are housed in a unique facility for the purpose of providing them with specific services deemed essential to their rehabilitation before being released into the community does not justify ignoring the ordinary understanding of the phrase "state prison."

The term reformatory is also not defined by statute. And, in the broadest sense, a reformatory is any facility "serving or designed to reform." *Random House Webster's College Dictionary* (1997). Further, although penal reformatories have traditionally been thought of as places for youthful offenders, *id.*, it has also been contrasted with a traditional prison as a place for inmates who have committed less serious offenses. See *People v Harper*, 83 Mich App 390,

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[3] Smith has not argued that the Tuscola Facility is not a secure facility or that it is not used to involuntarily confine persons that have been committed to the Department's jurisdiction. Rather, he limits his argument to whether a facility that is exclusively used to confine parolees constitutes a correctional facility within the meaning of MCL 800.283a(e).

398; 269 NW2d 470 (1978) (noting that prisons are institutions for persons convicted of more serious crimes, as distinguished from reformatories and county or city jails). Thus, a reformatory is a type of prison for youthful or less serious offenders. The Tuscola Facility houses persons who have been deemed fit for parole—that is, persons who are arguably less dangerous to society. As such, the Tuscola Facility could also constitute a reformatory within the plain and ordinary sense of that word.

We note that Smith's preferred construction for these terms is also undermined by its circular nature. He argues that the Tuscola Facility cannot be a state prison or reformatory because those institutions house prisoners and the Tuscola Facility houses parolees. But he also argues that the inmates at the Tuscola Facility are not prisoners because they have all been paroled from prison. Thus, he essentially argues that the inmates at the Tuscola Facility are not prisoners because they are not housed at a prison and the Tuscola Facility is not a prison or reformatory because it does not house prisoners. This argument conveniently ignores the fact that a person on parole can still be a prisoner within the meaning of the statute and that a facility can constitute a prison or reformatory within the ordinary meaning of those terms, notwithstanding that it confines persons who have been paroled, but not yet released into the community.

We also do not consider the fact that the prison at Ionia is apparently the only facility operated by the Department that is now referred to as a reformatory to be of any import. More than one hundred years ago, our Supreme Court looked past the label given to the Ionia facility and determined that it was a prison on the basis of its function: "Although the prison at Ionia is called 'a house of correction and reformatory,' it is no less than a State prison. Persons convicted of felony are sentenced to that prison, and confined there." *People v Gobles*, 67 Mich 475, 479; 35 NW 91 (1887). Similarly, we conclude that it is not the label assigned to a facility that determines its status as a prison or reformatory, but rather it is the purpose to which the facility is put that defines its nature. Therefore, the name given to the Tuscola Facility is irrelevant. Rather, we must determine its nature from the use to which it is actually put.

The Tuscola Facility is designed to confine persons committed to the Department's jurisdiction while those persons receive certain remedial services designed to help them transition into the community at large. It is secure and the inmates cannot leave without successfully completing the requirements attendant to their incarceration there.[4] It necessarily

[4] In determining whether the Tuscola Facility is a correctional facility we did not consider the photos attached to the prosecutor's brief on appeal because those photos were not part of the record. Nevertheless, Smith did not dispute the essential character of the Tuscola Facility: that it was a secure facility designed to involuntarily house parolees for a period of time before their release into the community or transfer back to a traditional state prison. Indeed, at the hearing on Smith's motion to withdraw his plea, the prosecuting attorney argued—without objection or counter argument—that the Tuscola Facility was a correctional facility because the parolees "are incarcerated despite their parole status" and were "not free to leave that facility at their leisure."

follows that the Tuscola Facility is a state prison or reformatory. Consequently, it is a correctional facility within the meaning of MCL 800.281a(e)(*i*).

C. CONCLUSION

When Smith pleaded to the charge at issue, he admitted that he conspired with another inmate at the Tuscola Facility to provide a cell phone to inmates at the Tuscola Facility. The inmates at the Tuscola Facility were and are prisoners within the meaning of MCL 800.281a(g) and the Tuscola Facility was and is a correctional facility within the meaning of MCL 800.281a(e)(*i*). Accordingly, Smith's statements were sufficient to establish the factual basis for his plea to the crime of conspiring to furnish a wireless device to a prisoner at a correctional facility. *Hogan*, 225 Mich App at 433; MCL 750.157a and MCL 800.283a. As such, the trial court did not abuse its discretion when it denied Smith's motion to withdraw his plea on that basis.

III. SENTENCING ERRORS

A. STANDARDS OF REVIEW

Smith also argues that the trial court committed several errors related to his sentencing. Specifically, he argues that the trial court failed to recognize that it had the discretion to set his maximum sentence within the range specified under the habitual offender statute. He also claims that the trial court confused the situation by referring to a plea deal that included only jail time. And he maintains that the trial court erred when it scored offense variable (OV) 9 at 25 points. With regard to OV 9, he states that there was no evidence to support a finding that his actions placed anyone in danger of injury, death, or property loss. As such, he maintains that this variable should have been scored at zero points. He concludes that these errors, alone or in conjunction, warrant resentencing.

This Court reviews a trial court's decision concerning whether to enhance a defendant's sentence under the habitual offender statutes for an abuse of discretion. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). However, trial courts do not have the discretion to choose how to score the sentencing guidelines; trial courts must score each required variable and must score them accurately. See *Bemer*, 286 Mich App at 32 ("Under the clear dictates of this statutory language, trial courts do not have any discretion in the scoring of the listed variables—each variable must be scored."). And this Court reviews de novo the proper interpretation and application of the sentencing guidelines. *People v Cannon*, 481 Mich 152, 156, 749 NW2d 257 (2008).

B. ANALYSIS

1. THE DISCRETION TO SET THE MAXIMUM

The Legislature sets the maximum sentence for an offense by statute. The maximum sentence for conspiracy to violate MCL 800.283a is five years. See MCL 750.157a(a); MCL 800.285(1). However, because Smith was a second-offense habitual offender, the trial court had the discretion to sentence him "to imprisonment for a maximum term that is not more than 1-½ times the longest term prescribed for a first conviction of that offense or for a lesser term." MCL

769.10(1)(a). Thus, the trial court had the discretion to set a maximum sentence that was greater than five years, but not more than seven and one-half years.

When a trial court fails to recognize that it has the discretion to set the maximum and fails or refuses to exercise that discretion, the defendant is entitled to resentencing. See *People v Merritt*, 396 Mich 67, 80; 238 NW2d 31 (1976). Thus, if a court fails to exercise its discretion in passing sentence due to a mistaken belief that the law requires a particular sentence, the defendant is entitled to resentencing. *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994). But the trial court is not required to "state on the record that it understands it has discretion and is utilizing that discretion." *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001). "Rather, absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *Id.*

In this case, the plea agreement included a sentence bargain that set the minimum sentence at six months and the maximum sentence at seven and one-half years, which is the maximum allowed for a second habitual offender. While advising Smith of his rights at the plea proceeding, the judge indicated that the sentence bargain "means that you would be looking at six months to seven and a half years, but obviously I think the People anticipate you're looking at county jail time." This was a mischaracterization of the bargain, which plainly called for a prison sentence. However, a different judge sentenced Smith and there is nothing to suggest that the sentencing judge was aware of this prior statement. In addition, Smith never objected to the prison sentence on the ground that he was promised a jail sentence. To the contrary, he stated that he wanted the court to follow the sentence bargain and the bargain plainly provided for a seven and one-half year maximum. During sentencing, Smith attempted to argue his motion to withdraw his plea, but the trial court refocused his attention on the sentencing issues: "we're just here concerned about the issue that is formulated before the Court and, that is, what is the appropriate sentence. We have a max set by statute and we have a minimum set by agreement of six months." After Smith stated that he wanted the court to follow the sentence bargain, the court stated, "I set the max at seven six and impose a minimum of 180 days . . . ." The court's statement that it was setting the maximum sentence at seven and one-half years is an indication that it was aware of its discretion and, given the context of that statement, that it was exercising its discretion by imposing the sentence agreed to by the parties.

There was no evidence that the trial court did not recognize its discretion. See *Knapp*, 244 Mich App at 389.

2. GUIDELINES SCORING

Finally, we conclude that the issue as to whether the trial court correctly scored OV 9 is moot, because Smith has already served his minimum sentence and apparently been paroled. *People v Tombs*, 260 Mich App 201, 220; 679 NW2d 77 (2003). Further, "[g]enerally, a defendant who voluntarily and understandingly entered into a plea agreement that included a specific sentence waives appellate review of that sentence." *People v Billings*, 283 Mich App 538, 550; 770 NW2d 893 (2009). Because defendant received a minimum sentence of six months in accordance with the sentence agreement, which sentence is less than the minimum sentence that Smith argues is more accurate, he is not entitled to relief. *Id.* at 551. Finally, although the revised range would have given the court the option of imposing a prison sentence

with a minimum term within that range or an intermediate sanction, see MCL 769.34(4)(c), there is nothing in the record to indicate that the court would have imposed an intermediate sanction over the sentence negotiated by the parties.

There were no sentencing errors that warrant resentencing.

IV. CONCLUSION

The trial court correctly determined that the inmates at the Tuscola Facility were prisons within the meaning of MCL 800.281a(g) and that the Tuscola Facility was a correctional facility within the meaning of MCL 800.281a(e)(*i*). Therefore, it did not abuse its discretion when it denied Smith's motion to withdraw his plea on the basis that his statements were insufficient to establish the factual basis for his guilty plea. The trial court also did not err when it exercised its discretion to set the maximum sentence to seven and one-half years in prison and any error in the scoring of OV 9 does not warrant relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto